

Oracle fails Rule 34's particularity requirement for many requests. Rule 34 of the Federal Rules of Procedure requires that parties "describe with reasonable particularity each item or category of items to be inspected." As identified during the teleconferences, many of Oracle's requests are so broad and compound that numerous other requests are completely contained within them.

For example, RFP 83's request of "All DOCUMENTS RELATED to any interviews YOU conducted to the extent they RELATE to the allegations in the [Amended] Complaint" completely includes Oracle's requests for interviews related to paragraphs 7-10 of the Amended Complaint at RFPs 17, 31, 45, and 62.⁷ Another example is Oracle's RFP 81 that states, inter alia: "All DOCUMENTS RELATED to any statistical analysis performed that RELATES to any of the violations alleged in the NOV or Amended Complaint." This request includes Oracle's previous requests for statistical analysis (RFPs 19, 33, 47 and 64) and "CASE ANALYSIS" (RFPs 16, 30, 44, and 61) for paragraphs 7-10 of the Amended Complaint and the NOV analysis for various violations (RFPs 74-78). Still another example is RFP 84 that seeks: "All DOCUMENTS RELATED to any statements made to YOU by any THIRD PARTY, including but not limited to applicants or employees, regarding any of the allegations in Paragraphs 7 through 10 of the Amended Complaint." RFP 84 includes Oracle's requests for communications between OFCCP and Third Parties in RFPs 18, 32, 46 and 63.⁸

In discussing the enormity of these requests, Oracle admitted at the teleconference that these were "catch-all" requests. Likewise, Oracle's "CASE FILES" RFPs (15, 29, 43, 60) for Paragraphs 7-10 are so broad that they include all of its RFPs for these paragraphs.⁹ Thus, these case file RFPs include the following RFPs: RFP 15 – RFPs 2-14 & 16-19; RFP 29 – 20-28 & 30-33; RFP 43 – RFPs 34-42 & 44-47; and RFP 60 – RFPs 48-58 & 61-64. In fact, because of how Oracle defines CASE FILE to include "*any files or system of files or records maintained electronically or physically* by OFCCP in its compliance audit of Oracle's headquarters in Redwood Shores, California," coupled with its "All documents related to" request language means that these requests literally include every document related to OFCCP's investigation in this litigation. Emphasis added. Another example of this lack of particularity are the first requests that Oracle makes for Paragraphs 7-10 of the Amended Complaint (RFPs 2, 20, 34, 48). For example, in RFP 20, Oracle requests "All DOCUMENTS RELATED to the claim in Paragraph 8 of the Amended Complaint that 'Oracle discriminated against qualified African American employees in Product Development roles' at HQCA." This request is so broad that it

⁷ E.g., RFP 17 states "All interview notes, summaries and memoranda for each interview YOU conducted that RELATES to the allegations described in Paragraph 7 of the Amended Complaint."

⁸ At the teleconference, OFCCP sought clarification about whether there was any difference between how Oracle was using statement and communication. In response, Oracle stated that it would have to think about it and that it would get back to OFCCP. However, Oracle never did in the teleconferences or in its July 27, 2017, letter.

⁹ E.g., RFP 15 states "All CASE FILES RELATED to the allegations described in Paragraph 7 of the Amended Complaint."

would include the documents requests for 13 other requests.¹⁰ Oracle acknowledged the enormity and lack of particularity for this request when it stated that "It's [the request] meant to carpet bomb." Please advise whether Oracle will withdraw RFPs 2, 15, 20, 29, 34, 43, 48, 60 and 81-84 or more narrowly tailor them.

10. *OFCCP can accept Oracle's modifications to RFPs 34, 40, 48, 52, 68, 75 and 76.*

In compromising, OFCCP will accept Oracle's modifications for RFPs 34, 40, 48, 52, 68, 75 and 76 without Oracle having to propound new RFPs. OFCCP will conduct a new search based on these modifications.

11. *OFCCP's response to Oracle's Interview Issues at Point XXIV.*

This section will address Oracle's many issues in terms of interviews. Oracle will conduct another diligent search of documents based on Oracle's new definition of interview. Since multiple people from Shauna Holman-Harries' team responded to OFCCP requests, OFCCP proposes that other members of her team be excluded from Oracle's definition of interview for the same reasons that Oracle excluded Ms. Holman-Harries. In terms of redacted manager interview summaries, OFCCP will reexamine this situation and to the extent that another Oracle manager was present during the entire interview, OFCCP will produce unredacted copies. For those managers who provided confidential communications to OFCCP without another Oracle Manager present, those managers are still protected by the government's information privileged pursuant to the case law previously provided. Please advise if this is acceptable to Oracle. Lastly, Oracle's protective order argument is disingenuous because Oracle continued to use privacy/confidentiality to refuse to produce documents even though one of the primary purposes it used to justify the protective order was to protect its employee's privacy.

However, many privileges cover the employee interviews. First, the informant's privilege applies to them because they are government informants. Second, the work product privilege applies to those interviews that were conducted at the direction of the Solicitor's Office.¹¹ Oracle will not be able to overcome this privilege because it has the opportunity to interview these employees as well. The deliberative process and investigative files privileges also apply to the extent that Oracle is seeking to obtain OFCCP's evaluation of significance of the comments that its employees made or Oracle is seeking the questions asked which would reveal OFCCP's internal investigative process. OFCCP will examine the interviews to determine if redacted portions thereof can be provided that will not violate these privileges.

¹⁰ RFP 20 encompasses the following 13 RFPs for Paragraph 8: 21 (qualified females), 22 (determination of comparable males), 23 (roles), 24 (controls), 25 (standard deviation), 26 (victims), 27 (identity of comparable whites), 28 (Comparisons between African Americans and comparable Whites), 29 (Case Files), 30 (Case Analysis), 31 (interviews), 32 (communications), and 33 (statistical analyses).

¹¹ Oracle's July 27, 2017, correspondence did not address the work product, deliberate process or investigative file privileges that OFCCP raised at the teleconferences.

12. *Oracle's unwillingness to narrow 12 RFPs.*

Oracle is currently unwilling to narrow 12 RFP: 14, 15, 18, 28, 29, 32, 42, 43, 44, 46, 54, 60, 63 despite the numerous objections and suggestions that OFCCP made for narrowing them. Moreover, as previously identified, Oracle is also unwilling to change RFPs 18, 32, 46 and 63 even though its definitions make them nonsensical for the request's CLASS MEMBER" portion. Additionally, because Oracle's Third Party definition is so expansive and its publically available exceptions are so limiting, Oracle is requesting communications between: OFCCP and its Bates stamping vendor, OFCCP and any court reporting service it uses, OFCCP and the Office of the Administrative Law Judges, OFCCP and another DOL agency like VETS, etc.¹² Oracle's attempt to acquire OFCCP's communications with its administrative vendors like a court reporter or the business that Bates stamps its documents is unreasonable. Oracle is likewise unreasonable when it wants OFCCP to produce documents from another DOL agency like VETS or the documents that OFCCP filed with the Court that it served Oracle. Again, OFCCP reiterates its requests for RFPs 18, 32, 46 and 63 to narrow them to class members and applicants should Oracle decide to modify its definitions.

Oracle likewise refused to narrow RFPs 14, 28, 42 and 54 that sought all documents related to OFCCP's gender and race comparisons. These requests, as written, would include almost every document in the case file related to a person since they would involve the gender or race of the person. Instead of the "all documents related to" language that Oracle insists upon, OFCCP is again requesting that Oracle tailor the requests to just those documents that OFCCP relied upon when making the comparisons.

Oracle is also refusing to narrow RFPs 15, 29, 43 and 60 which requested all documents related to the "CASE FILE." As a preliminary matter, Oracle's written comments are disingenuous and ignore its own "CASE FILE" definition and the issues that OFCCP raised during the teleconferences. Contrary to Oracle's written comments, its case file definition includes more than what is enumerated in the FCCM. Oracle stated: "'CASE FILE' means the Compliance Evaluation File (Federal Contract Compliance Manual 8KO1) and *any files or system of files or records maintained electronically or physically* by OFCCP in its compliance audit of Oracle's headquarters in Redwood Shores, California." Emphasis added. This expansive definition means any document or file that OFCCP has related to the investigation regardless of the particular interrogatory that this term is used. This definition coupled with the "All documents related to" language requires OFCCP to collect all public documents available to it and search all OFCCP, VETS, SOL, etc. offices nation-wide to determine if there are any documents related to OFCCP's litigation. This expansive search based on poorly drafted requests that fail Rule 34's particularity requirement that Oracle refuses to narrowly tailor is unreasonable.

¹² Oracle's July 27, 2017, letter stated it was requesting that OFCCP disclose communications "with other divisions of DOL, . . . VETS, and other [unnamed] agencies." Both VETS and the Office of Administrative Law Judges are agencies within the DOL.

13. *The Amended Complaint's conciliation statements that Oracle bases its requests upon are not relevant and the majority of the documents Oracle seeks for them are privileged.*

The conciliation documents that Oracle seeks are not relevant, the non-privileged ones are already in Oracle's possession/will be reproduced and the rest are protected by privilege. The Amended Complaint's conciliation statement extracts that Oracle cited in its document production requests are not relevant because Oracle's answer demonstrates that these particular extracts are not in dispute. The two conciliation extracts that Oracle cited to in the Amended Complaint are (1) OFCCP "attempted to conciliate with Oracle" and (2) OFCCP's "conciliation efforts were unsuccessful." While Oracle's responses to paragraphs 17 & 18 initially deny these paragraphs except for the show cause notice, they later establish that there are no disputes for these extracts: OFCCP engaged in conciliation efforts and its conciliation efforts were unsuccessful because the conciliation ended abruptly after the parties started to conciliate. Oracle's belief that OFCCP's actions were unreasonable or insufficient is not relevant because it already admitted through its description of events that the parties started conciliation and it concluded without success. Moreover, Oracle justified the non-production of documents for OFCCP's RFP 70 because it alleged that coverage was not in dispute because Oracle was willing to stipulate that it met the Executive Order thresholds to be a government contractor. Therefore the same justification that Oracle used for RFP 70 is applicable here.

Furthermore, even if this relevance objection is overruled, the vast majority of the documents are privileged under a variety of privileges such as attorney client, work product, deliberate process and investigative file. The only documents that would not be privileged are the communications between the parties which OFCCP has already committed to provide.

14. *OFCCP needs additional clarification from Oracle for the scope of RFP 82.*

Oracle offered to narrow RFP 82 if OFCCP offered to just narrow the scope of the evidence to the "compliance review at HQCA in September 2014" even though the Court established a violation time period to January 2013 that tentatively extends to January 2017. As such, it was not clear whether Oracle's offer extended to evidence that OFCCP obtained from January 2013 to January 2017 and evidence that it obtained through discovery for this time period.

15. *Oracle engaged in bad faith by adopting diametrically opposed positions regarding a party's discovery obligations depending on if it is seeking or defending discovery.*

This section addresses the numerous inconsistencies Oracle has taken depending on whether it is seeking or defending discovery. Prior to addressing these inconsistencies, OFCCP needs to address Oracle's self-serving actions in asserting that with respect to one of its inconsistencies—it's steadfast insistence that it is entitled to documents that relate to any statement in the complaint but its refusal to provide such documents with respect to the amount of its federal contracts despite that being referred to the Amended Complaint. Oracle harshly criticizes OFCCP for creating a "false equivalency" because Oracle offered to stipulate to the

point made in the complaint and therefore documents were inappropriate. Significantly, Oracle only offered the stipulation did not first offer to stipulate to the dollar amount in its contracts until after its July 27 letter, despite OFCCP repeatedly raising its entitlement to this information in teleconferences and Oracle only offered to withdraw its objection *after* the parties concluded their meet and confer teleconference, so OFCCP's so called "false equivalency" only became so as a result of Oracle's changing position. . Furthermore, the fact that Oracle did not address OFCCP other inconsistency arguments is also in bad faith because Oracle's July 27, 2017, letter is not truly reflecting the issues identified during the meet and confer teleconferences.

As outlined here, Oracle's inconsistency goes well beyond this one issue which Oracle has not yet corrected.

- A. *Oracle claims that documents are relevant and non-privileged if they reference statements in the Amended Complaint while simultaneously refusing to produce documents related to statements in Pleadings on relevance and privileged grounds.*¹³

Oracle repeatedly refused to produce documents that OFCCP sought on privilege and relevancy grounds even though the documents sought were related to statements in the Amended Complaint or Answer. For example, in RFP 29, OFCCP sought "All DOCUMENTS YOU rely upon or reviewed in making each and every affirmative defense set forth in YOUR ANSWER."

Oracle refused to produce on the basis of privilege even though there is an OFCCP case directly on point. In this case, the OFCCP ALJ ordered, inter alia, defendant to identify the documents it relied upon to support each of its affirmative defenses after finding no privilege. *OFCCP v. American Airlines, Inc.*, Case No. 1994-OFC-9 (ALJ, Jan. 19, 1995) ("ALJ granted OFCCP's request to compel Defendant to respond to a second set of interrogatories which sought 'facts and documents which American relied upon in support of each of the 24 affirmative defenses raised in its Answer.'"). Another example is RFP 70 wherein OFCCP requested: "All GOVERNMENT CONTRACTS to which YOU have been a party during the RELEVANT TIME PERIOD, including any addenda, modifications, affirmations, and/or novations." In its initial response, its supplemental response and in a July 26, 2017, meet and confer letter amending its supplemental response to this RFP, Oracle repeatedly refused to produce documents because they were not relevant.¹⁴ Oracle made these objections even though Paragraph 4 of the Amended Complaint stated: "Indeed, during the relevant time frame, Oracle had multiple contracts with the federal government totaling millions of dollars a year" and ALJ Berlin noted the relevance of the amount of government contracts in his *Google* decision that was referenced in Judge Larsen's Order that was referenced in Oracle's July 26, 2017, letter. In contrast to the previous positions Oracle took when responding to OFCCP's document

¹³ Despite this inconsistency being discussed at length during the meet and confer teleconferences, Oracle ignored it.

¹⁴ E.g., Oracle's July 26, 2017, letter stated: "Oracle maintains its objection that this request [RFP 70] does not seek information relevant to this litigation."

production requests, Oracle adopts a new approach when it is seeking discovery – the non-applicability of OFCCP’s relevance and privileged objections because Oracle’s document production requests addressed statements OFCCP made in its amended complaint or NOV. So while Oracle only resolved this issue for RFP 70 after it sent its July 27, 2017, letter because of its \$100 million stipulation this week, this issue remains for the other requests like RFP 29

B. Oracle refuses to produce documents because OFCCP’s “related to” requests are overly broad and unduly burdensome, but simultaneously demands OFCCP produce documents using the same “related to” language and definition when OFCCP made similar objections.

Oracle also flip flops its position even though the parties’ document requests use the same words and definitions. Oracle repeatedly refused to produce documents in response to OFCCP’s document requests because it claimed that the “related to” language in these requests made them unduly broad, overly burdensome and not proportional to the case. In fact, Oracle repeatedly adopted this position based on the wording alone without performing any kind of rudimentary search to ascertain how many documents would be responsive.

However later, when OFCCP makes the same objections to the same “related to” language having the same definition, plus a Rule 34 lack of particularity objection, Oracle finds the requests to be non-objectionable because it used the same definition as OFCCP and OFCCP’s objections are non-availing. As previously identified, a plain reading of “[a]ll documents related to” is any and all documents, however minor or material, however direct or tangential, however repeating they are that are related to the documents referenced. So, if Oracle is requesting all documents related to non-Asians being discriminated against to include identifying the names of these non-Asians, this request would include all documents wherein the race is identified and all documents wherein the name of the person is identified.¹⁵ Repeatedly, OFCCP requested that Oracle narrow the request from “All documents related to” to documents “sufficient to identify” or “all material documents OFCCP relied upon in paragraph XX that.” OFCCP suggested narrowing this type of requests to documents OFCCP relied upon because this is what Oracle identified in response to OFCCP’s question of what documents was Oracle seeking for them. However, Oracle only agreed to the sufficient to identify limitation for a handful of requests.

In response to a majority of the requests for this issue, Oracle just makes a vague offer to narrow the requests to “‘ALL DOCUMENTS RELATED to the comparisons’ and ‘ALL DOCUMENTS RELATED to YOUR determination,’ in such a way that does not include all documents that refer to a person’s race or gender or name.” Oracle then demands that OFCCP

¹⁵ E.g., in RFP 48 Oracle requested: “All DOCUMENTS RELATED to the allegation in Paragraph 10 of the Amended Complaint that ORACLE discriminates against qualified ‘[non-Asian]’ applicants in favor of Asian applicants, particularly Asian Indians based upon race for positions in the [‘PT1’] job group and Product Development line of business (or job function) at Oracle Redwood Shores.’ *This request includes but is not limited to all DOCUMENTS that identify the ‘non-Asians’ that OFCCP alleges to be victims of discrimination. Emphasis added.*

engage in a time consuming effort to identify those documents wherein a person's name, race, gender are implicated. This is not necessary since OFCCP previously identified how Oracle can revise these requests.

Any request that involves "all documents related to" the comparisons of race or gender, as specified above, necessarily includes all documents implicating race, gender, the name of the person, etc. Oracle could have easily narrowed this by simply stating all documents "sufficient to identify" instead of its current identify language. For example, a portion of RFP 48 can be changed to "This request includes but is not limited to all DOCUMENTS *sufficient to identify* the 'non-Asians' that OFCCP alleges to be victims of discrimination." Oracle also could have used the relied upon language example illustrated above to address this issue when the request is seeking more information than just the identity of people.

C. Oracle is also inconsistent with requiring specificity for objections that OFCCP makes while inexplicably excusing the lack of specificity for its objections.

Throughout the meet and confer process, OFCCP identified that Oracle failed to provide the required specificity to support its objections. OFCCP identified this problem in its initial meet and confer letter dated March 27, 2017, in its very first meet and confer teleconference on May 18, 2017, and in subsequent meet and confer correspondence (e.g., May 23, 2017). In fact, OFCCP cited to the district court case law that Oracle used in its March 27, 2017, letters and to additional circuit court case law¹⁶ for Oracle's unsupported boilerplate objections.¹⁷ Not only did Oracle make these boilerplate objections in its written discovery, it admitted during the meet and confer teleconferences that it still made these objections even though (1) it did not know if it had any responsive documents for many requests; (2) it stated it did not have any responsive documents for two requests; and / or (3) it did not know what the request was seeking for many requests. Additionally, in Oracle's May 24, 2017, response, it denied that these six objections were boilerplate and unsupported even though it used case law identifying these very objections as boilerplate.

However, Oracle takes a different stance when OFCCP makes the same objections to every single one of its requests. In its July 27, 2017, letter, at Point IV., Oracle requested that OFCCP amend its discovery responses to remove a series of objections made to each request because they were unsupported. Absent an agreement from Oracle to amend its responses to remove its

¹⁶ *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) ("We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege."); *McLeod, Alexander, Powel & Appfel, P.C v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (objections that document requests are "overly broad, burdensome, oppressive, and irrelevant" are insufficient to meet objecting party's burden of explaining why discovery requests are objectionable).

¹⁷ In response to *all* of OFCCP's RFPs, Oracle made the same six objections: "Oracle further objects to this request as overbroad in scope, uncertain as to time, . . . , unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case."

boilerplate objections cited in footnote 17 of this letter to each request, OFCCP has no reason to give up its objections.

D. *Oracle also takes inconsistent positions regarding the conduct of the meet and confer process.*

Oracle likewise takes dramatically different positions about the conduct of the meet and confer process depending on whether it is defending or taking discovery. When Oracle is defending discovery and requires the parties to spend 15 hours going request by request even though its written objections were either exactly the same or similar, Oracle praises this process and claims that the parties "made significant progress in gaining understanding and clarity regarding what kinds of documents OFCCP is interested in and in identifying areas of agreement and disagreement."¹⁸ However, when the parties engage in the same process for Oracle's discovery requests, Oracle claims it is prejudiced for spending less time (13.5 hours) on substantially the same number of requests (86 vs. 92). Moreover, when seeking discovery, Oracle complains about the words or phrases that OFCCP sought clarification for even though OFCCP sought clarification for a significantly lesser number and some of the same terms that Oracle sought clarification.

Another example of Oracle's bad faith is Oracle's responses to OFCCP's clarification questions. Oracle selectively takes issue that OFCCP sought to confirm from Oracle that it used the same interpretations that OFCCP used or OFCCP used the same or similar words in its documents. However, Oracle's disdain is belied by its actions during the previous meet and confer process when OFCCP was seeking documents. As shown in footnote 18, Oracle repeatedly found words that OFCCP used to be vague and ambiguous even though Oracle used these same terms (e.g., refuse, support, person, analyses, you, each, record, etc.) in its written discovery, briefs or correspondence. Moreover, Oracle's position is further undermined by its request that OFCCP identify documents by Bates stamp number because "it cannot be assumed that Oracle and OFCCP use the same nomenclature." Furthermore, the soundness of clarifying was repeatedly demonstrated when Oracle stated it needed to "think about it" or Oracle modified its definitions. Lastly, through the clarification process, the parties learned that they use different definitions for different words. In short, given Oracle's previous conduct, its complaints and "not well taken" remarks are in bad faith.

E. *Oracle likewise flip flops regarding requests that refer to documents outside of*

¹⁸ Part of this process was devoted to Oracle's vague and ambiguous objections. Oracle made vague and ambiguous objections to at least 150 words or phrases (OFCCP stopped counting at 150) and to such common words as: you; person; orally; present; support; each; sufficient to identify; communicating with; applications; current, former or prospective employee; change; increase; hire; previously employed; evaluating; interviews; records; decision; stating; supporting; persons with knowledge; personnel file; qualification; performance evaluation; standards used; analyses; results; assumptions; variables; etc.

*the requests.*¹⁹

Oracle likewise takes an inconsistent position when the document production requests refers parties to documents outside of these requests and whether these other documents seek legal conclusions. During the meet and confer process, Oracle repeatedly objected to OFCCP's requests that referenced the Code of Federal Regulations and refused to produce documents in response to them, *inter alia*, because (1) they referred to a document outside of the request that Oracle would have to reference, and (2) they called for a legal conclusion that violated Rule 34's particularity requirement because the requests allegedly required Oracle to interpret the regulation to respond. In response, OFCCP identified that parties frequently refer to documents outside of requests; the requests are relevant because they relate to OFCCP's claims and OFCCP was not seeking a new interpretation or legal conclusion that violated Rule 34's particularity requirement. Instead, OFCCP was simply seeking documents that Oracle previously created during the relevant time period for the stated regulations.

While Oracle refused to produce documents that referred to documents outside of the request, Oracle demands that OFCCP produce documents that referred to the Amended Complaint and Directive 307 even though they are also outside of the request. In response to these requests, OFCCP likewise made referral, legal conclusion, and Rule 34 particularity objections to the extent that the Court sustains Oracle's objections to like requests. Oracle disputed these objections and justified its reference to external documents on the same basis that OFCCP provided to Oracle: parties typically reference other documents in the requests such as complaints, the requests are relevant to OFCCP's claims, and Oracle is not requiring OFCCP to interpret Directive 307 now, but instead it is was seeking whatever documents it created in the past for Directive 307.

F. *Oracle also takes an inconsistent position for how it treats objections raised during the teleconferences that were not made in the written discovery responses.*

Oracle also acts inconsistently in its treatment of new objections. During the teleconferences concerning OFCCP's document production requests, Oracle repeatedly made objections that it did not make in its written responses. Furthermore, Oracle even asserted its ability to make privileged objections to requests that it did not make in its written responses if it later determined that there were privileged documents that were responsive to them. Furthermore, Oracle admitted that it made privileged objections to other requests without having a specific basis for doing so because it admitted that it did not know if there were any privileged documents that were responsive to them. However, Oracle questioned OFCCP when it raised new objections when addressing Oracle's problematic production requests and repeatedly made this an issue in its July 27, 2017, letter. Consequently, Oracle's comments and conduct are in

¹⁹ Oracle's July 27, 2017, letter only referenced OFCCP's objections to requests that referenced the Amended Complaint and not OFCCP's referral and legal conclusion objections to RFP 80 which referenced Directive 307. Apparently, Oracle did not want to disclose in writing that it provided the same rationale that OFCCP did when responding to the referral and legal conclusion objections.

bad faith.

Sincerely,

By: /s/ Norman E. Garcia
NORMAN E. GARCIA
Senior Trial Attorney



August 4, 2017

Via E-Mail

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Dear Mr. Garcia:

I write with respect to the telephonic meet and confer of August 4, 2017, relating to Oracle's document requests and interrogatories.

DOCUMENT REQUESTS

The items listed below are matters as to which the parties have reached some compromise. Oracle has indicated where it believes the compromise is not satisfactory. As to items not mentioned below, the parties have not reached agreement.

1. OFCCP has agreed to amend its responses so that they read "Subject to and without waiving the foregoing objections, OFCCP will produce all of its non-privileged, non-public, relevant documents, not including those produced by Oracle to OFCCP following the filing of the Complaint, within this Region."

Oracle has made the objection that limiting the scope of OFCCP's document production to this Region does not comport with discovery rules, which require OFCCP to make a reasonable search for documents in its possession, custody or control. And since OFCCP is unable to represent that other OFCCP offices and the various agencies under the Department of Labor did not possess relevant document, Oracle cannot agree to the limitation. In this regard, OFCCP has already indicated that other OFCCP offices participated in the compliance review. For example, OFCCP identified Robert LaJeunesse, Branch Chief of Expert services as an individual who participated in the compliance review. See OFCCP Resp. to ROG 1. Mr. LaJeunesse, notably, is listed as on the OFCCP's website as located in the "national" division. <https://www.dol.gov/ofccp/contacts/ofcpkeyp.htm>.

2. For the purposes of what is considered public or non-public for all requests and OFCCP's amended response noted above, Oracle excludes from all requests documents relating to the activities of administrative vendors. The parties discussed the following type of vendors that fall within this category: those who bates stamped documents, messengers, court reporters, and computer repair people.



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Oracle excludes as well statutes, case law, rulemaking documents, the federal register and items that can be found on OFCCP's public website in addition to the items mentioned in Oracle's letter of July 27, 2017.

With regard to public documents, OFCCP has agreed to produce public documents currently possessed or in the custody of OFCCP or that come into the possession or custody of OFCCP that are newsletters, articles, court filings, and complaints. These are representative examples of the public documents that Oracle seeks.

3. OFCCP will amend the objections that all documents created after March 11, 2016 were created in anticipation of litigation and are protected by the work product doctrine, trial preparation privilege and/or attorney-client privilege. OFCCP will produce correspondence between Oracle and OFCCP after the NOV issue date, including correspondence between counsel.

4. The parties have agreed that issues relating to the privilege log and the cut-off date for placing documents on the privilege log will not be raised with the ALJ at this time.

5. For purposes of RFPs 18, 32, 46 and 63, the definition of "Oracle" will be the same definition as to RFP No. 84 offered in Oracle's July 27, 2017 letter.

6. With regard to the definition of interview, Oracle would not consider correspondence between OFCCP and Neil Bourque, Charles Nyakundi and Lida Daniel to be an interview unless OFCCP considers the correspondence to be an interview or the correspondence meets the definition of formal or informal interview as defined by the FCCM 2M00.

7. Regarding interview memos, OFCCP will unredact interview memos of managers in those instances OFCCP confirms that another manager was present. For manager interviews where there was no one other manager present, OFCCP will leave those interview memos in redacted format. For employee interview memos that took place before the filing of the NOV, OFCCP will produce those interview memos in redacted form, removing identifying information. For memos reflecting interviews that post-date the NOV, OFCCP is asserting the work-product privilege. OFCCP refuses to accept this limitation except as to the first sentence of this paragraph. Otherwise, Oracle's position is set forth in its letter of July 27, 2017.

8. For the document requests that request documents related to conciliation, termed "conciliation documents" in your letter of August 3, 2017, OFCCP has agreed to provide non-privileged documents that have not already been produced by OFCCP.



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INTERROGATORIES

OFCCP will amend its interrogatory responses so that one interrogatory will not incorporate another. The exception to this is the incorporation of Interrogatory No. 1. OFCCP has also agreed to identify documents referenced in its interrogatory responses by bates stamp number. Other than that, OFCCP will review the interrogatories in light of the meet and confer process to determine whether the interrogatories will be further amended.

Next, I write to clear up some issues about which you said I reneged or lied about or which I was not clear in your view.

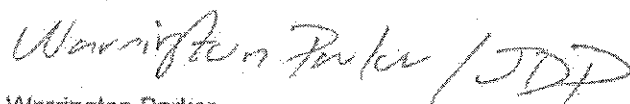
1. Oracle has not reneged on its definition of the phrase "all facts." The definition set forth in Oracle's July 5, 2017 letter is still operative.

2. The word "person" in the instructions should not be defined as "PERSONS," as that term is defined in the Interrogatories.

3. What Oracle said with regard to Federal Rule of Civil Procedure 33 in its letter of August 2, 2017, applies with equal force to 41 C.F.R. § 60-30.9.

4. The discussion concerning those interrogatories that seek the identity of persons with knowledge of facts, see, e.g., Rog No. 3, in Oracle's meet and confer letter of August 3, 2017, was an attempt to address OFCCP's claim that the interrogatories were vague and ambiguous.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Warrington Parker / JDP".

Warrington Parker

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August 7, 2017

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Re: *OFCCP v. Oracle, Inc.*, Case No. 2017-OFC-00006
Meet and Confer Letter addressing Oracle's August 4, 2017, letter

Dear Mr. Warrington:

This meet and confer letter is written in response to your August 4, 2017, letter sent on Friday after 5:00 p.m. Your letter purporting to memorialize our discussion is both inaccurate and incomplete. This letter will address these problems.

Documents:

1. Item #1 is inaccurate and incomplete because Oracle is renegeing on the solution it proposed. Oracle convened a three-hour series of meet and confer meetings on Friday, August 4, 2017, with less than 24-hour notice to determine if the parties can reconcile their differences from their previous meet and confer positions. OFCCP's August 3, 2017, correspondence stated: "OFCCP will produce all of its non-privileged, non-public, relevant, non-Oracle produced documents during this litigation . . . within this Region." After the parties' morning meet and confer communications on this issue, Oracle proposed a "solution" to this scope of production issue when it sent an e-mail at 12:15 p.m. that stated: "I went back to the way in which OFCCP offered to amend its responses. I offer this as a *solution* . . . 'OFCCP will produce all of its non-privileged, non-public, relevant documents, not including those produced by Oracle to OFCCP following the filing of the Complaint, within this Region.'" Emphasis added. OFCCP accepted this proposal before the start of the next meet and confer meeting at 2:30 p.m. with just the addition of "[s]ubject to and without waiving the foregoing objections" prior to the "OFCCP will produce . . ." language. After OFCCP accepted Oracle's proposed solution, the parties did not further discuss this issue. Furthermore, at no time during the afternoon teleconference did Oracle ever mention Robert LaJeunesse's name or state it was changing its position from the agreed upon solution it proposed to contesting this issue again. *Soto v. Commercial Recovery Sys., Inc.*, 2011 WL 1298697, at *2 (N.D. Cal. 2011) ("Defendant should not be permitted to renege on a compromise of a discovery

dispute.”); *United States v. Butler*, 2000 WL 134697, at *2 (D. Kan. 2000) (“Defense counsel agreed to the [discovery] offer made by the government, and the court believes that he should abide by it.”).

2. Oracle’s item #2 is also incorrect and incomplete for the following reasons:
 - A. Oracle failed to identify all of the administrative vendors OFCCP identified. For example, all of the vendors identified in OFCCP’s August 3, 2017, letter were discussed. However, not all of them were listed in Oracle’s August 4, 2017, letter. All of them should have been included. Furthermore, the items listed in the August 3, 2017, letter were just representative samples as evidenced by the “etc.” notation.
 - B. Oracle’s August 4, 2017, letter failed to address the public documents on its website even though this issue was raised in OFCCP’s August 3, 2017, letter, and the parties’ discussion on August 4, 2017. Since the documents on its website are available to the public, they are to be excluded.
 - C. Oracle’s reference to other public documents is incomplete and inaccurate. It is incomplete because Oracle specifically excluded documents in OFCCP’s control, e.g., documents on the internet, court filings, etc., that were not in OFCCP’s possession or custody. It is inaccurate because Oracle never raised “representative sample” for these documents. Instead, Oracle just cited to internet articles, complaints and court filings. OFCCP will limit Oracle’s redefining of public documents to just those public documents that the parties discussed and agreed would not be considered public documents for the purposes of Oracle’s document production requests.
3. To avoid any ambiguity with Item 4, OFCCP will identify what was discussed and agreed upon and the issues that were not discussed. Both parties agreed not to raise the issue of a privilege log cut-off date to the Court when OFCCP was seeking March 11, 2016, and Oracle was seeking December 9, 2016. Oracle also stated that it would not raise its privilege log issues to the Court because they had not been fully addressed thus far during the meet and confer process. However, the parties did not address and OFCCP never stated that it would not raise other privilege log issues with the Court regarding Oracle not producing a privilege log for the documents it was withholding that were dated prior to March 11, 2016. Therefore, OFCCP maintains the positions it asserted in its August 3, 2017 letter.
4. Oracle’s item 5 does not make any sense because Oracle did not define “Oracle” in its July 27, 2017, letter for RFP 84 or define “Oracle” in its document production requests in the definition’s section. Instead, Oracle only defined “Oracle” in its interrogatories.
5. Item #7 is likewise incorrect and incomplete because OFCCP in both its August 3, 2017, letter and in its August 4, 2017, stated more objections than what is stated in Oracle’s August 4, 2017, letter. Thus, OFCCP maintains the positions it asserted in its August 3, 2017.

- A. OFCCP noted that the interviews would be redacted with the (1) deliberate process privilege to the extent they contain OFCCP's evaluation of what was stated; (2) investigative files privilege to the extent they reveal OFCCP investigative techniques such as the questions it asked; and (3) informant's privilege to the extent they identify the informant for employee interviews or reveal information stated in confidence for manager interviews wherein another Oracle manager was not present.
 - B. OFCCP asserted more than just the work product doctrine for the interviews conducted after the NOV issue date. For example, it also cited the informant's privilege.
6. Oracle's item 8 is vague and ambiguous and it is not clear if it is attempting to imply something different from Item 3. To the extent that Oracle is trying to state or imply something different in Item 8 than Item 3, OFCCP states it will only produce the non-privileged correspondence between the parties after the NOV issue date of March 11, 2016, because it considers the other post March 11, 2016, documents to be privileged.

Interrogatories:

- 1. Item 1 is incorrect because the parties still dispute whether Oracle reneged in its August 2, 2017, letter. This issue was only resolved because Oracle restated and reaffirmed its position prior to the August 2, 2017, letter.
- 2. Item 3 is also incorrect because the parties did not agree that Rule 33 of the Federal Rules of Civil Procedure applied with equal force with 41 C.F.R. § 60-30.9. Rule 33 is different and has different case law as stated in Oracle's March 9, 2017, letter: "Thus, Federal Rule of Civil Procedure 33 . . . do[es] not apply." See point 5 of OFCCP's August 4, 2017 letter. As such, OFCCP maintains its position stated in its August 4, 2017, letter. This is the second letter in a row that Oracle misstated OFCCP's position on this issue. Previously, on August 2, 2017, Oracle incorrectly stated that OFCCP discussed Rule 33 when it never discussed Rule 33 for the objections exception. Instead, it discussed 41 C.F.R. § 60-30.9 in detail.
- 3. Item 4 is likewise incorrect because the parties did not agree that Oracle clarified the information requested. Instead, Oracle changed the wording of the interrogatories such that these changes constitute new interrogatories. OFCCP maintains its position stated in its August 4, 2017, letter.

Sincerely,

By: /s/ Norman E. Garcia
NORMAN E. GARCIA
Senior Trial Attorney



August 7, 2017

VIA E-MAIL

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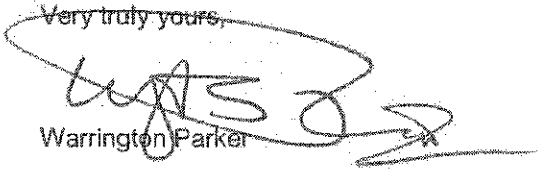
Re: *OFCCP v. Oracle, Inc. et al.*, OALJ Case No. 2017-OFC-00006

Dear Mr. Garcia:

I write in response to your letter of today.

Apparently, the parties have not reached agreement. I do not agree with your account or position. But after over 20 hours of meeting and conferring, I do not believe further conversation on these subjects will bring resolution.

Very truly yours,


Warrington Parker